(5)

No. 96-1581

IN THE
Supreme Court of the United States

OCTOBER TERM, 1996

STATE OF SOUTH DAKOTA,
Petitioner,
v.

YANKTON SIOUX TRIBE, a federally recognized tribe of Indians, and its individual members; DARRELL E. DRAPEAU, individually, a member of the Yankton Sioux Tribe,
Respondents,
and

SOUTHERN MISSOURI WASTE MANAGEMENT DISTRICT, a nonprofit corporation,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF CITIES DANTE, GEDDES, LAKE ANDES, PICKSTOWN, PLATTE, RAVINIA AND WAGNER, *AMICI CURIAE*, IN SUPPORT OF PETITIONER, STATE OF SOUTH DAKOTA

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The cities of Dante, Geddes, Lake Andes, Pickstown, Platte, Ravinia and Wagner, respectfully submit this brief as *amici curiae*, in support of Petitioner pursuant to Supreme Court Rule 37(4).

INTEREST OF *AMICI* CITIES

Five of the *amici* cities, Wagner, Lake Andes, Ravinia, Dante and Pickstown are located within the 1858 boundaries of the reservation recently declared to exist by the court of appeals for the Eighth Circuit; two of the *amici* towns, Geddes and Platte, lie close to the purported boundaries. Each of the cities within the newly recognized boundaries of the Yankton Sioux Reservation has operated, since its founding a few years after the 1894 Surplus Land Act in question, as if no reservation boundaries exist. Each of the cities respectfully expresses its profound shock to this Court over the decision of the court of appeals. Importantly, we understand that this is only the second time that any federal court of appeals has ever held that a congressional act of this nature did not disestablish the reservation area affected; the first and only other case with a similar holding was promptly reversed in *DeCoteau v. District County Court*, 420 U.S. 425 (1975). Brief of Respondent, Southern Missouri Waste Management District, in Support of Petitioner, State of South Dakota at 10, *Yankton Sioux Tribe v. Southern Missouri Waste District*, (No. 96-1581) (April 28, 1997). And each of the cities requests this Court to grant review of the decision of the court of appeals, a decision which conflicts with both the prior and subsequent decisions of the South Dakota Supreme Court, and resolve the issue created by the federal decision.

Prior to the organization of Charles Mix County, South Dakota, this area was visited and occupied by various Indian tribes. E. Peterson and L. Peterson, *1906 Atlas*

of Charles Mix County, South Dakota, (1906) at 48. The Ree or Aricara Indians are among the earliest residents, dating back more than three hundred years. *Id.* at 48. The Ree were eventually driven out by the Oglala Sioux branch of the Tetons, who, in turn, were partially displaced by the Yankton Sioux in the early 1800's. *Id.* at 48. "Few of the Indians, however, had made this part of the state their principal place of abode as other localities seemed to them more desirable. This part of the state was therefore used only as a hunting ground." *Id.* at 48. By the mid-1800's, the Charles Mix County area was rarely hunted by the Indians, "for large game had sought better pastures farther west and north, and the Indians had gone with the game." *Id.* at 50. The Yankton Sioux eventually settled the area pursuant to the treaty of 1858. *Id.* at 48.

In the late 18th century and throughout the entire 19th century a continual non-Indian presence was felt in the area in the form of resident French trappers, explorers, river traders, wood cutters and the U.S. Army, whose influence culminated in 1857 with the completion of Ft. Randall. *Id.* at 48.

> In speaking of the history of Charles Mix county we shall see that it is in no sense a "new" county. It had a community life along the river before Dakota Territory was organized and had been visited by more white men before that time than any of the "old" counties not having a Missouri river front. *Id.* at 48.

The 1858 treaty with the Yankton Sioux established the Yankton Sioux Reservation which consisted of approximately 430,000 acres in the eastern portion of what is now Charles Mix County. The Yankton Sioux settled the reservation on July 10, 1859, a date commonly associated with the restoration of all of Charles Mix County, except the Yankton reserve, to the public domain. *Id.* at 49. Charles Mix County was created at the first territorial legislature of Dakota by its act of May 8, 1862. *Id.* at

49. The Yankton Indian reservation was later incorporated into the county boundaries in 1873, although the reservation continued to have "little or nothing to do with county affairs and took no part in our community life until after the treaty of 189[4]." *Id.* at 48.

In 1892, the government negotiated with the Yanktons for the sale of their surplus lands, resulting in a treaty signed by a majority of the Tribe and ratified by Congress on August 15, 1894. *Id.* at 49. These lands were opened to homesteading by the president's proclamation of May 16, 1895 and were quickly populated. *Id.* at 49. By early 1900, virtually all of the surplus lands had been homesteaded. A. Gnirk, *Epic of the Realm of Ree,* (1984), p. 8. The population of Charles Mix County by 1900 was 8,498. 1906 *Atlas of Charles Mix County, South Dakota, supra,* 46.

Several of the cities which are *amici* here were created along the Milwaukee Railroad through the "former Indian lands from Napa to Platte," South Dakota. A. Gnirk, *Epic of Papineau's Domain,* (1986), p. 143. In fact, the area of Charles Mix County which contains a majority of the country's towns was once part of the "Yankton Sioux Reservation until 1895 when the land of eastern Charles Mix County was thrown open to homesteaders." *Id.* at 143.

Wagner was created by the Milwaukee land company in 1900, just six years after the 1894 Act which opened the Yankton Reservation. A Gnirk, *Epic of the Realm of Ree,* (1984), p. 62. According to the 1990 Census, Wagner's population was 1462, of whom 281 are Indian. 1990 Census of Population and Housing, Summary Population and Housing Characteristics, South Dakota, pp. 33, 57. City and county records indicate that there are approximately 1510 properties within the city limits of Wagner; approximately 1450 are owned by non-Indian persons or entities, four are owned by the Yankton Sioux Tribe, six are held in trust by the United States for an

Indian person, and fifty are owned in fee by individual Indians.

The decision of the court of appeals would convert the entirety of Wagner to "Indian country" pursuant to 18 U.S.C. § 1151(a) by designating it as a reservation. Paradoxically, even as this case was being litigated, an Indian person failed in a claim that a housing development in Wagner qualified as "Indian country" presumably as a dependent Indian community under 18 U.S.C. 1151(b). *See Primeaux v. Lee*, Memorandum Opinion and Order, Civ. 94-9022 (D.S.D. 1995); *aff'd per curiam, Primeaux v. Lee*, 74 F.3d 1243 (8th Cir. 1996). The Defendant in that case failed *even to make the claim* that the entirety of Wagner should be declared Indian country as a "reservation"; the failure of the district court and court of appeals to find the housing area to be Indian country simply reaffirmed the long-held understanding of all the residents of the area that Wagner was not "Indian country" as a reservation pursuant to 18 U.S.C. 1151(a) or partly "Indian country" pursuant to 18 U.S.C. 1151(b).

The residents of Wagner can also point to *State v. Winckler*, 260 N.W.2d 356 (S.D. 1977), another case which arose within Wagner and in which the South Dakota Supreme Court stated that it had "ruled that the Yankton Indian reservation was disestablished. . . ." *Id.* at 360.

In addition, as recently as 1980, a unanimous court of appeals was of the same opinion:

> In our opinion, the district court correctly determined that the crimes of grand larceny and burglary did not occur in "Indian Country" as defined in 18 U.S.C. § 1151(b), so as to preclude state court jurisdiction.[2]
>
> [2] The Supreme Court of South Dakota has twice determined that the original Yankton Indian Reservation had been diminished by an Act of Congress. *Wood v. Jameson*, 81 S.D. 12, 130 N.W.2d 95, 99 (1964); *State v. Williamson*, 211 N.W.2d 182, 184 (S.D. 1973). Appellant does not challenge these holdings in this appeal.

Weddell v. Meierhenry, 636 F.2d 211, 213 (8th Cir. 1980).

Lake Andes was established as a railroad siding stop in 1900 and became a full-fledged town in 1904. *Epic of Papineau's Domain, supra*, 143. Lake Andes was named the Charles Mix County seat in 1916 and remains the county seat to date. *Id.* at 143. Lake Andes submits the unlikelihood of the residents of Charles Mix County selecting a town within a "reservation" to be a county seat, when only half the county is within the purported boundaries. In any event, according to the 1990 Census, the population of Lake Andes was 846 persons, of whom 246 were Indians. *United States Census, supra* at 33. City and county records indicate that there are approximately 1060 properties within the city limits of which approximately 998 are owned by non-Indians or non-Indian entities, two of which are owned by the Tribe, eight are held in trust by the United States for an individual Indian, two are owned by the Native American Women's Resource Center and fifty are owned in fee by individual Indian persons.

Most of the county offices or headquarters are located in Lake Andes, as are various state offices. The Charles Mix County Law Enforcement Center is located in Lake Andes and provides services to the entire county and surrounding area. The city provides drinking water to all the Yankton Sioux tribal housing units within Lake Andes and to the approximately 70 housing units in the Yankton Sioux Tribe housing units southeast of Lake Andes. The city itself maintains twenty-four separate housing units, through its city housing authority; many or most of these units are occupied by Indian persons. Like Wagner, Lake Andes can point to specific judicial authority which assured it, had there been any doubt, that the reservation had long been disestablished. In *Wood v. Jameson*, 130 N.W.2d 95 (S.D. 1964), the South Dakota Supreme Court held that it was the purpose of the 1892 agreement

and 1894 Act of Congress "to disestablish the reservation. . . ." *Id.* at 99.

The town of Ravinia was also created as a railroad stop in 1909. A. Gnirk, *Epic of the Realm of Ree*, (1984), p. 157. The 1990 Census sets the population of Ravinia at 79, 34 of whom are Indian. Of the 185 properties within its boundaries, approximately 182 are held by non-Indians and non-Indian entities and three are held in trust by the United States for an Indian person.

Dante was likewise founded as a railroad stop. According to the 1990 Census, its population is 98, of whom 12 are Indian. City and county records indicate that approximately 185 properties exist within its boundaries; no properties are owned by the Tribe, individual Indians, or by the United States in trust.

Pickstown, like each of the towns identified above, now finds itself within the purported boundaries of the Yankton Sioux reservation. Pickstown was created in 1947 by the United States Army Corps of Engineers to accommodate construction workers and their families while working on the Fort Randall Dam. *Epic of Papineau's Domain, supra* at 527. Pickstown was released from its federal domination in 1986 and the properties were sold, ceded or relinquished to its residents. According to the 1990 Census, its population was 95, of whom 6 were Indian. The official records of the city indicate there are approximately 190 properties within the city limits; 186 are owned by non-Indians or non-Indian entities and four are owned by Indians. There are no properties owned by the Yankton Sioux Tribe or held in trust by the United States government.

Generally speaking, the demography of the situation in this entire area parallels the area under consideration in *DeCoteau v. District County Court*, 420 U.S. 425 (1975). Keeping in mind that in this litigation the contested area, as in *DeCoteau*, involves essentially the non-Indian fee lands, only one other point need be specially noted. In *DeCoteau*, approximately 90% of the tribal

members were said to actually reside on trust lands (in HUD community housing projects and other individual homes). Brief for Respondent at 196, *DeCoteau v. District County Court*, 420 U.S. 425 (1975) (No. 73-1148). In this 1858 Yankton reservation area, that percentage is apparently somewhat less, though a clear majority of the Yankton tribal members are similarly situated. And while the trust allotments of the members do constitute approximately 10% of the total land base, only a small fraction of that area is actually resided upon or farmed by members of the Yankton Sioux Tribe. Again, this fact situation parallels that presented in *DeCoteau*. *Id.*

The five cities above, all of which find themselves within the 1858 boundaries of the Yankton reservation, are joined in this *amici* brief by two sister cities, Geddes and Platte. Geddes is located approximately fifteen miles northwest of Lake Andes, or one mile west of the eastern 1858 boundary. Platte was established in 1900 as the last city on the railroad line running west in Charles Mix County. A. Gnirk, *Epic of the Great Exodus*, (1985), p. 92. Both cities are demographically similar to those noted above.[1]

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[1] Although not included as *amici*, two additional towns in Charles Mix County which were not created or established due to the railroad were Marty and Greenwood. Marty was founded in 1913 and is located 10 miles south of Ravinia and 13 miles southwest of Wagner and was named for the Rt. Rev. Martin Marty a pioneer Catholic bishop in South Dakota. A. Gnirk, *Epic of the Realm of Ree* (1984), pp. 12, 186. The town of Marty is, perhaps, best known for the mission and Indian school located there. *Id.* at 186. According to official county records, all of the land within the boundaries of Marty is held in trust by the United States government for the benefit of an Indian person [illegible] is owned by an individual Indian person. According to the 19[illegible] census, the population of Marty was 436 persons, 412 of which were Indian persons.

The town of Greenwood is located approximately 5 miles southeast of Marty and was first established as an Indian agency. All of the property located within the boundaries of Greenwood is held in trust by the United States government for individual Indian persons.

Each of the *amici* cities within the 1858 boundaries has experienced immediate dramatic adverse impacts as a result of the decisions of the district court and court of appeals, despite the subsequent decision of the South Dakota Supreme Court. Problems involving law enforcement, zoning, landlord-tenant, provision of utilities, and foreclosures, all difficult in the best of situations, have become permeated with uncertainty. Local officials cannot reliably and finally say that state, or federal law actually applies to a diverse variety of situations which occur on the non-Indian lands within the 1858 boundaries and within their cities. The uncertainty provides an additional means by which those who wish to evade the law can do so and provides a similar haven to those who commit civil wrongs against their neighbors.

The jurisdictional uncertainty referred to above has been exacerbated by the failure of the federal authorities to provide adequate resources to meet the responsibilities they now claim as a result of the federal decision. Prior to the decision of the courts below, all law enforcement activities on non-Indian lands were provided locally through a centrally located county law enforcement center; a full-time sheriff, with three full-time deputies and two part-time deputies; and supplemented by local police departments with six full-time officers and two part-time officers. The State circuit court is located in the Charles Mix County courthouse in Lake Andes, South Dakota.

After the decisions, the United States claims that it has jurisdiction of felony investigations involving Native American suspects or Native American victims, but it has provided only one FBI agent based over one hundred miles outside the county in Sioux Falls, South Dakota. The federal court is also located there. Further, the FBI agent's duties are not limited to investigations within the 1858 boundaries; rather, the additional investigations were simply added to the agent's already heavy urban case load. The United States Attorney's Office has not provided additional staff to handle the cases it now

claims.[2] Further, despite its new assertion of jurisdiction, the federal authorities have no plans at present to base any FBI locally, to the cities' knowledge. The result is clearly a decline in effective law enforcement.[3] The crim-

[2] The tribal chairman indicated at trial that he intended that the United States would greatly expand its criminal law jurisdiction if the Tribe were successful in the litigation. T. 330-331. He admitted, however, that he had not discussed the increased jurisdiction with the U.S. Attorney nor did he know the position of the U.S. Attorney on the matter. T. 331. (The cities suggest that the United States was just as shocked by the decisions below finding the 1858 boundaries intact as were the *amici* cities.)

[3] The present situation is not surprising, for even when reservation status is not apparently at issue, reservation law enforcement is generally regarded as ineffective, especially with regard to the "most common crimes." *See, e.g., Jurisdiction on Indian Reservations—Part 2: Hearing Before the Senate Select Committee on Indian Affairs*, 96th Cong., 2d Sess. at 24 (Aug. 11, 1980) (hereinafter *Jurisdiction—Part 2*): "The most common crimes, such as assaults or small burglaries, simply are not prosecuted in the vast majority of instances." (comment of Caleb Shields, Ft. Peck Tribal Executive Board); *Id.* at 56 (comment of Senator Melcher revealing complaints of state judges that federal authorities do not prosecute even major crimes); *Id.* at 32 (comment of local chief of police that only one of ten "felony-type" theft, burglary or assault cases are prosecuted on the reservation); *Id.* at 26 (United States Magistrate's comment on infrequency of prosecution of reservation assaults). Similar testimony was received approximately a decade later. *See, e.g., Investigation and Prosecution of Federal Crimes on Indian Reservations: Hearings Before the Committee on Interior and Insular Affairs*, House of Representatives, 101st Cong., 1st Sess. at 187 (1989): "[O]nly the most aggregious [sic] and clear-cut cases can properly be pursued." (comment of Tribal Chairman Ketachezan); *Id.* at 281: "[W]e see an awful lot of people who probably should be prosecuted for different things just simply slip through because no one is quite sure who is in charge." (comment of Representative Campbell); *see also* H.R. Rep. No. 101-60, 101st Cong., 1st Sess. at 7 (1989). In addition, legislators in both the 1980 and 1989 hearings drew attention to the fact that reservation law enforcement let cases "fall through the cracks." *See Jurisdiction—Part 2, supra* at 21 (comment of Senator Melcher); *Investigations and Prosecution of Federal Crimes on Indian Reservations: Oversight Hearings Before the Committee on Interior and Insular*

inal law problem, however, presents more than the difficulties attendant to a decline in effective law enforcement. The most critical problem is that, without intervention by this Court, there is no solution to the controversy over which entity actually has jurisdiction of the crimes now being committed. Numerous habeas corpus petitions are already ongoing and will continue to challenge the jurisdiction of courts which have in the past or might in the future take jurisdiction of a now disputed criminal case. Uncertainty thus permeates the criminal law, as well as the civil law sphere, within the *amici* cities.

We note further, that, at trial, the tribal chairman was equivocal as to whether the Tribe *intended* to exercise jurisdiction over non-Indians on non-Indian lands, assuming that it was successful in the litigation. *See, e.g.*, T. 322-334. Nonetheless, since the Tribe has been successful in the federal litigation, it has made it very clear to local city officials, in conferences and otherwise, that the Tribe *will* attempt to regulate non-Indian hunting and fishing on non-Indian lands, *will* establish licensing procedures with regard to non-Indians, and *will* attempt to regulate access to state and federal facilities and lands by non-Indians, particularly those on the Missouri River. The Tribe has not exercised such jurisdiction at least since *amici* towns were founded in the early 1900's, and the Tribe thus promises to radically alter the status quo.

The residents of Charles Mix County are, by and large, highly informed as to cases being litigated in other parts of the nation regarding tribal issues. Aberrant tribal court outcomes such as that appealed in *Burlington Northern R.R. v. Red Wolf*, 106 F.3d 868 (9th Cir. 1997) are tremendously unsettling to the non-Indian residents. Further, the inevitability of extensive and burdensome litigation over tribal regulation and control of non-Indian

Affairs, 100th Cong., 2d Sess. 249 (1988); *Prosecution of Federal Crimes*, *supra* at 249: "Case-by-case determination can lead to a cumbersome, inefficient process which ultimately leads to cases falling through the cracks." (comment of Representative Tim Johnson.)

interests, as detailed above, has caused land owners to suspect that a further and significant decrease in property values is likely in the event the court of appeals decision is not reversed.[4]

REASONS FOR GRANTING THE PETITION

I. THE AGREEMENT IN THE *YANKTON* CASE NOW BEFORE THIS COURT IS THE "FUNCTIONAL TWIN" OF THE AGREEMENT AT ISSUE IN *DECOTEAU v. DISTRICT COUNTY COURT*, AND THEREFORE THIS COURT SHOULD REVERSE ON THE BASIS OF *DECOTEAU*.

Not only did the court of appeals spurn the bright-line "presumption" articulated in *Solem v. Bartlett*, 465 U.S. 463 (1984) and *Hagen v. Utah*, 510 U.S. 399 (1994), the court also failed to apply the precedent of *DeCoteau v. District County Court*, 420 U.S. 425 (1975). In *DeCoteau*, this Court considered an agreement of the United States with the Sisseton-Wahpeton Sioux Tribe which resulted in disestablishment. The Yankton Agreement of three years later is the "functional twin" of the Sisseton Agreement and *DeCoteau* therefore strongly suggests a finding of disestablishment in the *Yankton* case.

The term "functional twin" was employed by the Court in *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 609 (1977), and denoted the identity, except for the "operative language" of the Agreements, of a 1907 Agreement

[4] One recent witness at a Senate Indian Affairs Committee hearing, a rancher on South Dakota's Cheyenne River Sioux Reservation, testified that it was his opinion that the prices of property on that reservation "are regularly discounted about 25 percent. These facts make it difficult for non-Indians to either stay or leave." Tribal Sovereign Immunity: Hearing before the Committee on Indian Affairs, S. Hrg. 104-694, 104th Cong., 2d Sess. 45. The recent experience of *amici* towns has led them to surmise that the loss in property value identified in the Senate Hearing will most probably be replicated within the 1858 boundaries, should the decision of the court of appeals remain unreversed.

and an earlier 1904 Agreement. Because the Agreements constituted "functional twins," except for the critical "operative" language, the Court found the later Agreement (which *lacked* cession language) accomplished disestablishment, just as the earlier agreement had accomplished disestablishment. *Id.* As we demonstrate below, the origin, content, and outcome of the Sisseton and Yankton agreements make them even better "functional twins" than the agreements at issue in *Rosebud.*

This argument takes on special importance for the residents of the *amici* cities because of the proximity of the former Sisseton reservation at issue in *DeCoteau* (roughly 150 miles northeast of the *amici* cities) and because the agreements and local histories of the two areas were known to be so similar. *Amici* cities and their residents could and legitimately did, we respectfully submit, continue to assume that no reservation existed at Yankton based on *DeCoteau* and the legal and factual similarities between the two situations.

Summarily, in every respect even arguably significant, the Yankton documents mirror and reflect the same terminology, discussions, considerations, policies, and generalities presented in *DeCoteau.* The Yankton Commissioners even repeatedly referred specifically to the terms of the Sisseton Agreement. Br. of Resp't District in Supp. of Pet'r at 18. *See also*, South Dakota Representative Pickler's remarks in the congressional record ("same kind of a treaty we have always made" . . . "procure these lands in the same way" . . . "we make no departure from our past policy" . . . "just as all other cessions of land" . . .). *Id.* at 28-29. As a result, in both instances the Commissioner of Indian Affairs and the Secretary of the Interior also acknowledged that both reservations were "restored to the public domain." *Id.* at 10-11. *See generally Hagen* at 412-414 (public domain).

In this light, we submit that the "functional twin" characteristics of the two situations do, in fact, demon-

strate that this Court's decision in *DeCoteau* should dispose of this case.

II. FACTORS DEMONSTRATING THE YANKTON AND SISSETON AGREEMENTS ARE FUNCTIONAL TWINS.

SISSETON DISESTABLISHMENT	YANKTON DISESTABLISHMENT
Time period equivalent Agreement approved 1891. *DeCoteau*, 420 U.S. at 427.	*Time period equivalent* Agreement approved 1894. 28 Stat. 286 (1894).
Allotment of substantial territory under General Allotment Act. *DeCoteau*, 420 U.S. at 455.	*Allotment of substantial territory under General Allotment Act.* Exhibit 605, p. 5.
Preambles equivalent. The Sisseton Indians "are desirous of disposing of a portion of the land set aside and reserved to them. . . ." *DeCoteau*, 420 U.S. at 455.	*Preambles equivalent.* "The Yankton Tribe . . . is willing to dispose of a portion of land set aside and reserved to said Tribe. . . ." App. 112.
Cession language used. "The Sisseton and Wahpeton Bands of Dakota or Sioux Indians hereby cede, sell, relinquish, and convey to the United States all their claim, right, title and interest. . . ." Art. 1, cited at *DeCoteau*, 420 U.S. 456.	*Cession language used.* "The Yankton Tribe of Dakota or Sioux Indians hereby cede sell, relinquish, and convey to the United States all their claim, right, title, and interest. . . ." Art. 1, App. 112-113.
All unallotted lands ceded. Cession pertains to "all the unallotted lands within the limits of the reservation set apart to said bands of Indians as aforesaid remaining after the allotments and additional allotments provided for in article four of this agreement. . . ." Art. 1, *DeCoteau*, 420 U.S. at 456.	*All unallotted lands ceded.* Cession pertains to "all the unallotted lands within the limits of the reservation set apart to said Indians as aforesaid." Art. 1, App. 112-113.

Sum Certain Language Used. Sisseton Agreement provides "[i]n consideration for the lands ceded, sold, relinquished and conveyed . . . the United States stipulates and agrees to pay . . . the sum of two dollars and fifty cents per acre for each and every acre thereof. . . ." Art. 2, *DeCoteau*, 420 U.S. at 456.	*Sum Certain Language Used.* Yankton agreement provides "[i]n consideration for the lands ceded, sold, relinquished, and conveyed to the United States . . . the United States stipulates and agrees to pay . . . the sum of six hundred thousand dollars. . . ." Art. II, App. 113.
Missionaries allowed to purchase lands. Art. 2, *DeCoteau*, 420 U.S. at 457.	*Missionaries allowed to purchase lands.* Art. X, App. 117.
United States retained an agency and schools. *DeCoteau*, 420 U.S. at 435 n.16; *id.* at 438 n.19.	*United States retained an agency and schools.* App. 116.
Lands retained were scattered about the former reservation. *DeCoteau*, 420 U.S. at 428.	*Lands retained were scattered about the former reservation.* App. 159.
The proclamation opening the reservation referred to a "schedule of lands within the . . . reservation . . . ." 27 Stat. 1017, 1018 April 11, 1892).	*The proclamation opening the reservation referred to a "schedule of lands within the . . . reservation . . . ."* 29 Stat. 865, 866 (May 16, 1895).
Congress clearly intended to return the land to the public domain. *DeCoteau*, 420 U.S. at 440-441.	*Congress clearly intended to return the land to the public domain.* 26 Cong. Rec. 6425 (1894); *id.* at 6426.
State assumed virtually unquestioned jurisdiction. *DeCoteau*, 420 U.S. at 442.	*State assumed virtually unquestioned jurisdiction.* App. 38; Dissent, App. 62; *State v. Greger*, App. 154-155.

Sisseton-Yankton generally treated in parallel fashion on maps. Exhibit 33 (1889) (showing both reservations; Exhibit 620 (1901) (eliminates both Yankton and Sisseton reservations); Exhibit 621 (1910) (eliminates both reservations); Exhibit 44 (1909) (BIA adds both Sisseton and Yankton as blank).	*Sisseton-Yankton generally treated in parallel fashion on maps.* Exhibit 33 (1889) (showing both reservations; Exhibit 620 (1901) (eliminates both Yankton and Sisseton reservations); Exhibit 621 (1910) (eliminates both reservations); Exhibit 44 (1909) (BIA adds both Sisseton and Yankton as blank).

As noted above, in *Rosebud*, the Court found a 1907 Act to diminish the Rosebud reservation the same as the 1904 Act even though the 1904 Act *had* contained language of cession and the 1907 Act had *not* contained language of cession. This Court found that "as the legislative comments make clear . . . the change in § 1 language was not intended to modify or change the purposes or operation of the 1904 Act." *Rosebud*, 430 U.S. at 609. *Rosebud* thus strongly indicates that when identical language is used, identical results are intended. This was so, in the case of *Rosebud*, even when the operative language was different and when the "cession language" was eliminated, because the legislative comments made clear that no change from the earlier Act was intended.

In this instance, as Charles Mix County has noted, even the United States has described the Sisseton Agreement as "a similar and contemporaneous cession agreement" containing "the same language." Brief of Charles Mix County, South Dakota, *Amicus Curiae* in Support of Petitioner, State of South Dakota at 18, *Yankton Sioux Tribe v. Southern Missouri Waste Dist.* (No. 96-1581) (May 7, 1997) citing BUS, Co. App. at 166a.

There are a few differences between the agreements. *Both* agreements, however, contain the critical cession and sum certain language as "operative language." *See Hagen*, 510 U.S. at 412-416. Several of the changes from the Sisseton to the Yankton agreement, moreover, make the Yankton agreement even a stronger argument for disestablishment than the Sisseton agreement.

The liquor provision and its history are of special importance for the Yankton Act contained this provision while the Sisseton Act did not. Article XVII of the 1894 Yankton Act provided that intoxicating liquor could not be sold upon reservation lands after they were ceded and opened to settlement:

> No intoxicating liquors nor other intoxicants shall ever be sold or given away upon any of the lands by this agreement ceded and sold to the United States, nor upon any other lands within or comprising the reservations of the Yankton Sioux or Dakota Indians as described in the treaty between the said Indians and the United States, dated April 19th, 1858, and as afterwards surveyed and set off to the said Indians. The penalty for the violation of this provision shall be such as Congress may prescribe in the act ratifying this agreement.

App. 120; Act of August 15, 1894, ch. 290, 28 Stat. 286, 318.

Thus, federal liquor laws applied on lands, "as described in the treaty between the said Indians and the United States, dated April 19th, 1858. . . ." *Id.* This provision would be surplusage if the reservation were *not* diminished by the Act of 1894, as intoxicants were *already* forbidden in "Indian country" by federal law. *Perrin v. United States*, 232 U.S. 478, 484 (1914). Furthermore, this Court has said, of a provision in the 1910 Act concerning the Rosebud Sioux Reservation, that:

> the most reasonable inference from the inclusion of this [liquor prohibition] provision is that Congress was aware that the opened, unallotted areas would henceforth not be "Indian country" because not in the Reservation.

Rosebud, 430 U.S. at 613. *See also id.* at n.47.

The legislative history of Article XVII in the Yankton Act also supports this proposition. According to the 1893 Commissioner of Indian Affairs Report to Congress on the Yankton Agreement:

> Article XVII, prohibiting the sale or disposition of intoxicants upon any of the lands now within the Yankton reservation, seems to be a desirable provision, and from the decision of the Supreme Court in *United States v. 43 Gallons of Whiskey* (93 U.S. 188), the stipulation would appear to be valid if ratified by the United States.

Exh. 605, App. 15. The passage implies diminishment in that it referred in 1893 to lands "*now* within the Yankton Reservation. . . ." Thus, before the Yankton agreement was ratified by Congress in 1894, the Commissioner looked to a time when the lands would *not* be "within the Yankton Reservation."

Further significance is found in the citation of *United States v. Forty-three Gallons of Whiskey*, 93 U.S. 188 (1876). In that case, the Court held that Congress may prohibit liquor not only within "Indian country," but also within a "territory in proximity to that where the Indians live." *Id.* at 195. The citation of this case by the Commissioner of Indian Affairs indicates that he believed that the ceded lands would no longer be part of a reservation but that this Court's decision in *Forty-Three Gallons of Whiskey* would nonetheless permit the liquor prohibition of Article XVII.

A further salient distinction, demonstrating that case for disestablishment of Yankton is even stronger than at Sisseton, is found in the tribal constitutions. In 1946, the tribal constitution at Sisseton claimed jurisdiction only as to:

> *Indian owned lands* lying within the territory within the original confines of the Sisseton-Wahpeton Lake Traverse Sioux Reservation.

DeCoteau, 420 U.S. at 443, quoting Article 1 of the October 16, 1946, Constitution (emphasis added). In 1966, three years after the court of appeals had found the 1891 Act terminated the Sisseton Reservation, the Commissioner of Indian Affairs approved a new constitu-

tion which provided that the jurisdiction of the Tribe shall "extend to lands lying in the territory within the original confines of the Lake Traverse Reservation. . . ." *Id.* quoting the 1966 Constitution. Thus, by 1966, the Sisseton Tribe claimed reservation boundaries in its constitution.

The constitutions at Yankton, however, have *never* claimed such boundaries. According to the 1962 Constitution of the Yankton Sioux Tribe, a Constitution which remains in effect *to this day*:

> The territory under which this Constitution shall exist shall extend to all original tribal lands *now owned by the Tribe* under the treaty of 1858.

Exhibit 652 (emphasis added). The Yankton Constitution has never been amended to claim tribal boundaries.

Thus, in coming before this Court, the Yankton Sioux Tribe cannot assert a tribal constitutional claim to reservation boundaries. It would, moreover, be highly anomalous to allow a tribe to succeed on a claim of boundaries in this Court when it had not even made that claim in its own constitution. In this respect also, the Yankton situation presents a stronger and more persuasive case for disestablishment than did the Sisseton case.

The Tribe's attempt to distinguish the two agreements is derived mainly from the Section XVIII savings section. As the Dissent below pointed out, however, there is *nothing in the record which supports the contention that the savings section was meant to preserve the boundaries of the reservation.* Dissent, App. 54-56. Furthermore, the savings section is itself internally ambiguous in providing both for the preservation of *all* provisions of the 1858 agreement *and* the *annuity* provisions of the 1858 agreement. *Id.*

In *Rosebud*, the 1907 Agreement was the "functional twin" of a 1904 Agreement even though the 1907 Agreement lacked the "operative language" of "cession." Here, the Yankton agreement and the Sisseton agreement both contain the critical "cession and sum certain" language and numerous other indicia that they should be treated equivalently. Furthermore, the Yankton agreement is in certain respects stronger than the Sisseton agreement with regard to disestablishment. Given this situation, the *Rosebud* "functional twin" analysis strongly suggests a finding that the Yankton reservation, like the Sisseton reservation, has been disestablished.

With this background, it is not surprising that the negotiators and Indians at Yankton both equated the Sisseton agreement signed in 1889 with the Yankton agreement signed in 1892. For example, Commissioner Cole said during the Yankton negotiations:

> The Commissioners are now ready to make you an offer for your surplus lands . . . . It is more than the Government paid for the Sisseton reservation and it is the highest price we have ever known the Government to offer.

Exhibit 605, at 80. Tribal member John Cole also said that "[t]he Sisseton Reservation was purchased by the government at $2.50 per acre." *Id.* at 77. Henry Selwyn linked the 1892 Yankton agreement with both the Treaty of 1858 by which the Yankton reservation had been diminished *and* the transaction by which the Sisseton Indians had sold their lands. He stated:

> I will now refer to the treaty of 1858. This is the second time we sold land to the Government. I think they should be very grateful to us for selling our land. . . . If the Sissetons and Titowan had sold their land at the same prices at which we sold ours in 1885 per acre they would have given the Government their lands for nothing.

Id. at 63. The identity of the two agreements makes it logical that the Yankton Indians should perceive the Sisseton agreement as equivalent to theirs. It confirms that the two agreements are, in fact, "functional twins."

CONCLUSION

For the foregoing reasons, and those stated in the Petition, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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